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FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Mar 09, 2020

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

HELEN JEAN P.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 1:18-CV-03236-RHW

**ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

Before the Court are the parties' cross-motions for summary judgment. ECF Nos. 13, 15. Plaintiff brings this action seeking judicial review pursuant to 42 U.S.C. § 1383(c)(3) of the Commissioner of Social Security's final decision, which denied her application for supplemental security income under Title XVI of the Social Security Act, 42 U.S.C. §1381-1383F. *See* Administrative Record (AR) at 872-904. After reviewing the administrative record and briefs filed by the parties, the Court **GRANTS** Defendant's Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

**ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT ~ 1**

1 **I. Jurisdiction, Procedural History, and Relevant Sequential**
2 **Evaluation Findings**

3 This case has a lengthy history. Plaintiff applied for supplemental security
4 income on December 18, 2009. AR 116-19. She alleged disability beginning on
5 September 12, 2006.¹ AR 116. Plaintiff's application was initially denied on July
6 6, 2010, AR 78-81, and on reconsideration on September 24, 2010. AR 87-90.
7 Plaintiff then requested a hearing with an Administrative Law Judge (ALJ). AR
8 91-93.

9 A hearing with an ALJ occurred on November 9, 2011. AR 41-75. On
10 January 26, 2012, the ALJ issued a decision concluding that Plaintiff was not
11 disabled as defined in the Act and was therefore ineligible for supplemental
12 security income. AR 17-40. The Appeals Council denied Plaintiff's request for
13 review on January 30, 2013, AR 1-7, and Plaintiff filed a complaint in this district
14 challenging the denial of benefits. AR 669-673; *see Helen P. v. Carolyn W. Colvin*,
15 2:13-CV-03034-FVS, ECF No. 5 (E.D. Wash. 2013).

16 In June 2014, the court issued a decision concluding that the ALJ's decision
17 was not supported by substantial evidence and contained legal error. AR 677-693;
18 *Helen P.*, 2014 WL 2452870, at *1. First, the court concluded that the ALJ failed
19 to adequately develop the record for purposes of considering whether Plaintiff met

20 ¹ However, for claims under Title XVI, benefits are not payable prior to the application's filing date. *See* 20 C.F.R. § 416.335.

1 the criteria for Listing 12.05C, the listing for intellectual disability. AR 682-83.
2 The court determined that remand was necessary to develop the record with respect
3 to Plaintiff's special education background. AR 683. Next, the court concluded that
4 the ALJ's reasons for discounting Plaintiff's credibility were inadequate and that
5 remand was also necessary for the ALJ to reconsider his credibility finding. AR
6 683-89. Finally, the court concluded that the ALJ improperly rejected the opinion
7 of Plaintiff's treating psychologist, Kirk D. Strosahl, Ph.D., and also failed to
8 adequately discuss lay witness reports from Plaintiff's friend. AR 690-92. For
9 these reasons, the court remanded the case so that the ALJ could develop the
10 record regarding Plaintiff's educational history, reassess his step three finding,
11 reconsider his credibility finding, and reweigh the medical opinion and lay witness
12 evidence. AR 692.

13 Following the court's remand, a different ALJ held a hearing on May 26,
14 2015. AR 564-635. At the hearing, the ALJ called vocational expert Leta Berkshire
15 as a witness. AR 623. Ms. Berkshire testified that employers would tolerate eight
16 to ten absences per year, but qualified that those absences had to be spread out
17 throughout the year and could not be clustered closely together. AR 626-27.
18 Pursuant to the court's remand order, the ALJ also developed the record with
19 respect to Plaintiff's educational history. AR 547, 800-810.

1 On July 2, 2015, the ALJ issued a second decision again finding that
2 Plaintiff was not disabled as defined in the Act and was therefore ineligible for
3 supplemental security income. AR 539-557. The ALJ analyzed whether Plaintiff
4 met the criteria for Listing 12.05C and concluded that she did not. AR 547-48.
5 Next, the ALJ reconsidered the prior credibility finding and again determined that
6 Plaintiff's subjective symptom complaints were overstated. AR 549. In making this
7 determination, the ALJ reasoned that Plaintiff's testimony was inconsistent with
8 her prior reports, conflicted with the medical evidence, and was belied by her daily
9 activities. AR 549-553. Finally, the ALJ reweighed Dr. Strosahl's opinion and
10 reconsidered the lay witness reports from Plaintiff's friend. AR 554-555.

11 Plaintiff again filed a complaint in this district challenging the denial of
12 benefits. AR 950-58; *see Helen P. v. Carolyn W. Colvin*, 1:15-CV-03157-FVS,
13 ECF No. 3 (E.D. Wash. 2015). The matter was referred to a U.S. Magistrate Judge.
14 AR 959. Plaintiff moved for summary judgment challenging, among other things,
15 the ALJ's step five finding. *Helen P.*, 1:15-CV-03157-FVS, ECF No. 17, at 21.
16 Plaintiff noted Ms. Berkshire's testimony that missing nine days of work per year
17 would be problematic if the days were clustered together, but would be permitted if
18 they were separated throughout the year. *Id.* Plaintiff argued that the ALJ found
19 that she would miss nine days of work per year, but failed to address the frequency
20 or timing of these absences. *Id.* Given the possibility that these nine absences could

1 occur closely together, Plaintiff argued that it was unclear whether she could
2 perform the jobs the ALJ cited at step five. *Id.* Plaintiff also argued that the ALJ
3 again improperly discounted her subjective pain complaint testimony. *Id.* at 19-20.

4 The Commissioner agreed that the ALJ erred in failing to address whether
5 Plaintiff's absences would be clustered together or spread out throughout the year.
6 *Helen P.*, 1:15-CV-03157-FVS, ECF No. 24, at 2, 21. However, the Commissioner
7 argued that the remainder of Plaintiff's contentions were without merit and asked
8 the court to only remand for the limited purpose of resolving the ambiguity at step
9 five. *Id.*

10 On November 22, 2016, the Magistrate issued a report and recommendation.
11 AR 959-1010. The Magistrate agreed with the parties that remand was necessary to
12 clarify whether the frequency of Plaintiff's absences would allow her to perform
13 the jobs identified at step five. AR 967. The Magistrate rejected Plaintiff's
14 remaining arguments, including her challenge to the ALJ's adverse credibility
15 finding. AR 968-1008. Specifically, the Magistrate held that the ALJ reasonably
16 interpreted the medical evidence and properly concluded that her physical and
17 mental limitations were not as severe as she alleged. AR 981-83. The Magistrate
18 also held that the ALJ properly relied on Plaintiff's daily activities as well as
19 factual inconsistencies in her reports to find that her symptoms may have been
20 overstated. AR 984-88.

1 In light of these holdings, the Magistrate recommended that the case be
2 remanded so the ALJ could reconsider his step five finding and ensure that the
3 residual functional capacity allowed Plaintiff to perform other work. AR 1008. On
4 December 19, 2017, the report and recommendation was adopted in its entirety and
5 the case was remanded to the Commissioner for further proceedings. AR 1017-18.

6 Following the court's remand, Plaintiff provided the ALJ with a January
7 2015 psychological evaluation from Thomas Genthe, Ph.D., which was not
8 previously part of the record. AR 891; *see* AR 1348-1356. The ALJ held another
9 hearing on July 12, 2018. AR 907-924. At this hearing, the ALJ called vocational
10 expert Mark Harrington. AR 917-923. The ALJ clarified that Plaintiff would be
11 absent from work one and one-half days per month. AR 917. Mr. Harrington
12 testified that based on Plaintiff's residual functional capacity, she could perform
13 the jobs of table worker (30,000 jobs nationwide), touch up screener (40,000 jobs
14 nationwide), and printed circuit layout taper (30,000 jobs nationwide). AR 918.
15 Mr. Harrington testified that the U.S. Department of Labor does not publish job
16 numbers for each individual occupation, but rather groups jobs into categories and
17 then publishes numbers for each category. AR 921. He then testified that his job
18 number estimates were "based on OES numbers" and that he used "Job Browser"
19 to get the numbers for each individual occupation. AR 921.

1 On October 18, 2018, the ALJ issued a third decision again finding that
2 Plaintiff was not disabled as defined in the Act and was therefore ineligible for
3 supplemental security income. AR 872-895. The ALJ first noted that the court had
4 upheld most of his prior decision—including his evaluation of Plaintiff’s
5 credibility—and that “[t]he only issue on remand [was his] prior step five finding.”
6 AR 875. The ALJ then adopted and incorporated his prior findings at steps one
7 through four as well as his prior credibility determination. AR 877-891. The ALJ
8 also considered Dr. Genthe’s January 2015 evaluation, as this was not previously
9 part of the record. AR 891-92.

10 Per the court’s remand order, the ALJ then reconsidered his prior step five
11 analysis. AR 893-95. Based on Mr. Harrington’s testimony, the ALJ found that
12 Plaintiff could perform the jobs of table worker, touch up screener, and printed
13 circuit layout taper. AR 894.

14 Plaintiff did not file written exceptions nor did the Appeals Council opt to
15 review the decision, so the ALJ’s decision became administratively final once the
16 period for review expired. AR 873; *see* 20 C.F.R. §§ 404.984, 416.1484. On
17 December 19, 2018, Plaintiff timely filed the present action seeking judicial review
18 of the Commissioner’s final decision. ECF No. 1. Accordingly, Plaintiff’s claims
19 are properly before the Court pursuant to 42 U.S.C. § 1383(c)(3) and 42 U.S.C. §
20 405(g).

II. Standard of Review

A district court's review of a final decision of the Commissioner is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited and the Commissioner's decision will be disturbed "only if it is not supported by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1144, 1158-59 (9th Cir. 2012) (citing § 405(g)).

III. Statement of Facts

The facts of the case are set forth in detail in the transcript of proceedings and only briefly summarized here. Plaintiff was 39 years old on the date she filed her application, which the regulations define as a younger person. AR 123, 892; *see* 20 C.F.R. §§ 404.1563(c), 416.963(c). She graduated from high school with a “special diploma” and can read, write, and communicate in English. AR 127, 129, 810, 915-16. She has no past relevant work. AR 892.

IV. Issues for Review

Plaintiff argues that: (1) substantial evidence does not support the ALJ's step five finding that other jobs existed in significant numbers in the national economy that she could perform, (2) the ALJ improperly discredited her subjective pain complaint testimony, (3) the ALJ improperly weighed Dr. Genthe's opinion, and (4) the ALJ erred by failing to reference or analyze the testimony of Leta

1 Berkshire—the prior vocational expert who testified at the May 2015 hearing—in
2 his new decision. ECF No. 13 at 6-18.

V. Discussion

A. Substantial Evidence Supports the ALJ’s Step Five Finding that Other Jobs Existed in Significant Numbers in the National Economy that Plaintiff Could Perform

6 Plaintiff first argues that the vocational expert's job number estimates were
7 inaccurate because they were based on something called "OES groups"² rather than
8 specific numbers for each individual occupation. ECF No. 13 at 6-11. Plaintiff
9 states that she performed her own labor market research in Job Browser and that
10 her search produced job number estimates that were significantly lower than the
11 vocational expert's. ECF Nos. 13 at 9-10, 13-1 at 1-9.

12 In this case, the vocational expert, Mr. Harrington, testified that Plaintiff's
13 residual functional capacity allowed her to perform the jobs of table worker, of
14 which there are 30,000 jobs nationwide, touch up screener, of which there are
15 40,000 jobs nationwide, and printed circuit layout taper, of which there are 30,000
16 jobs nationwide. AR 918. Mr. Harrington agreed that the U.S. Department of
17 Labor does not publish numbers for each individual occupation, but rather groups
18 jobs into categories and then publishes numbers for each category. AR 921. He

² Plaintiff does not define or explain this term in any detail, but it is an acronym for “Occupational Employment Statistics.” *See* Occupational Employment Statistics, U.S. BUREAU OF LABOR STATISTICS, <https://www.bls.gov/oes/home.htm> (last accessed March 8, 2020).

1 then testified that his job number estimates were “based on OES numbers” and,
2 importantly, that he used Job Browser “to get the numbers *for the individual*
3 *occupations.*” AR 921 (emphasis added). Plaintiff’s counsel never cross-examined
4 Mr. Harrington regarding the accuracy of those estimates, nor did counsel ever
5 argue or suggest that the numbers were inaccurate either in his closing argument,
6 in a post-hearing brief, or before the Appeals Council. *See* AR 923.

7 Plaintiff now argues that Mr. Harrington’s job number estimates (30,000,
8 40,000, and 30,000 nationwide) were inaccurate because they reflected the
9 numbers for entire job categories rather than the numbers for each individual
10 occupation. ECF No. 13 at 8-9. However, Mr. Harrington testified that his
11 estimates were only *based on* the OES numbers but that he used Job Browser to
12 determine “the numbers for the individual occupations.” AR 921. Thus, Plaintiff’s
13 suggestion that the job number estimates do not reflect each individual occupation
14 is without merit.

15 Plaintiff also argues that she performed her own labor market research in Job
16 Browser and that her search produced job number estimates that were significantly
17 lower than the vocational expert’s. ECF No. 13 at 9-10. However, submitting one’s
18 own research from Job Browser—evidence that is unauthenticated, unsworn,
19 outside of the record, not subject to questioning, and unaccompanied by any
20 analysis or explanation from a vocational expert to put the raw data into context—

1 is not a sufficient basis to undermine the reliability of a testifying vocational
2 expert's opinion. *Martinez v. Colvin*, 2015 WL 4270021, at *9 (C.D. Cal. 2015);
3 *Cardone v. Colvin*, 2014 WL 1516537, at *5 (C.D. Cal. 2014); *Vera v. Colvin*,
4 2013 WL 6144771, at *22 (C.D. Cal. 2013); *Solano v. Colvin*, 2013 WL 3776333,
5 at *1 (C.D. Cal. 2013). In her reply brief, Plaintiff argues that claimants need to be
6 able to question vocational experts' opinions in the event they contain
7 "fundamentally inaccurate information." ECF No. 16 at 5. While true, Plaintiff did
8 have this opportunity—counsel could have questioned Mr. Harrington about the
9 accuracy of his estimates at the hearing, raised the issue in closing argument, filed
10 a post-hearing brief, or filed written exceptions with the Appeals Council. What
11 Plaintiff cannot do, however, is submit unauthenticated documents from outside
12 the record for the first time on appeal to argue that the vocational expert's opinion
13 was unreliable. *See Martinez*, 2015 WL 4270021, at *9.

14 **B. This Court has Already Upheld the ALJ's Credibility Determination**

15 Plaintiff argues the ALJ erred by discounting her testimony regarding her
16 subjective symptoms. ECF No. 13 at 11-14. Plaintiff made this same argument in
17 her most recent appeal to this court. *See Helen P. v. Carolyn W. Colvin*, 1:15-CV-
18 03157-FVS, ECF No. 17, at 19-20 (E.D. Wash. 2015). The Magistrate extensively
19 analyzed the ALJ's credibility determination, *see* AR 979-988, and held that the
20 ALJ properly relied on the medical evidence, Plaintiff's daily activities, and factual

1 inconsistencies in Plaintiff’s reports to find that her symptoms may not have been
2 as severe as alleged. AR 981-88. On remand, the ALJ acknowledged the court’s
3 holding and incorporated his prior credibility analysis into the new decision. AR
4 891. The Court declines to revisit its prior determination upholding this finding.

5 *See Stacy v. Colvin*, 825 F.3d 563, 567 (9th Cir. 2016).

6 Plaintiff asks the Court to revisit its prior holding because the controlling
7 law changed: SSR 96-7p (1996) was superseded by SSR 16-3p (2016) to clarify
8 the use of the term “credibility.” ECF No. 13 at 12. However, the purpose of the
9 new ruling—as the ALJ acknowledged, AR 891—was to “clarify that subjective
10 symptom evaluation is not an examination of an individual’s character.” SSR 16–
11 3p (2016). It simply made “clear what [Ninth Circuit] precedent already required.”
12 *Trevizo v. Berryhill*, 871 F.3d 664, 678 n.5 (9th Cir. 2017). It did not substantively
13 change the controlling law and Plaintiff points to nothing in the changed policy
14 that would alter this court’s prior analysis.

15 Plaintiff also argues that the ALJ was required to revisit his prior credibility
16 determination because he stated at the July 2018 hearing that he would hear “the
17 matter de novo and . . . examine the facts and the law again.” ECF No. 13 at 11;
18 *see* AR 910. However, the ALJ did not mean that he would rehear the entire case
19 and revisit his prior findings at every step of the sequential evaluation process. The
20 parties had just discussed how the “case was remanded on a narrow [vocational]

1 issue” and in context, it appears the ALJ meant that he would reexamine the facts
2 and the law on this discrete issue. AR 910.

3 Finally, Plaintiff argues that the ALJ should have revisited his prior
4 credibility determination in light of the new medical records he obtained for the
5 July 2018 hearing. ECF No. 13 at 12-13. However, the evaluations Plaintiff cites—
6 Dr. William Drenguis’s October 2016 evaluation and Dr. Alexander Patterson’s
7 September 2016 evaluation—were both done after the relevant period (December
8 2009 to March 2016) and thus do not relate to the period at issue in this case. *See*
9 AR 1357, 1362. Plaintiff similarly argues that the Commissioner found her
10 disabled as of April 2016 but again, that finding does not apply to the period at
11 issue here.

12 **C. The Newly Obtained Opinion from Dr. Genthe is Consistent with the
13 Residual Functional Capacity**

14 Plaintiff argues that the ALJ erred in considering the January 2015
15 psychological evaluation from Thomas Genthe, Ph.D., which was not previously
16 part of the record. ECF No. 13 at 14-16; *see* AR 891.

17 Dr. Genthe conducted a mental status examination and administered an IQ
18 test. AR 1352-56. The mental status examination was essentially normal. AR
19 1352-53. The IQ test revealed verbal reasoning abilities in the “extremely low
20 range,” although Plaintiff’s nonverbal reasoning abilities were “significantly
higher.” AR 1351. Dr. Genthe diagnosed Plaintiff with mild depressive disorder

1 and borderline intellectual functioning. AR 1350. He opined that Plaintiff's
2 "depression does not cause clinically significant distress or impairment in
3 functioning." AR 1348. With respect to Plaintiff's intellectual functioning, he
4 generally opined that it either did not affect, mildly affected, or moderately
5 affected her ability to perform various work activities. AR 1350-51. He did opine,
6 though, that it markedly affected her ability to adapt to changes and follow detailed
7 instructions. AR 1350. Nevertheless, Dr. Genthe stated that Plaintiff could likely
8 perform simple, repetitive tasks in environments that did not have significant
9 distractions or require cognitive flexibility ("i.e., entry-level labor positions"). AR
10 1351. He believed that Plaintiff's mental impairments would last "0 months" but
11 that her intellectual impairments would last "[i]ndefinitely." AR 1351.

12 The ALJ found that Plaintiff's low intellectual functioning was one of her
13 severe impairments. AR 877. However, the ALJ agreed with Dr. Genthe that
14 Plaintiff was nevertheless able to perform unskilled, repetitive, and routine work.
15 AR 883, 889. The ALJ outlined Dr. Genthe's opinion and found that it was
16 consistent with the residual functional capacity. AR 891-92. But to the extent it
17 conflicted with the residual functional capacity, the ALJ assigned it no weight
18 because (1) Dr. Genthe indicated that Plaintiff's limitations would last for "0
19 months," (2) his mental status examination findings were normal, (3) Plaintiff
20 herself stated that it was her physical impairments that prevented her from

1 working, not her mental ones, and (4) Dr. Genthe's opinion contained vague
2 phrases like, "She *may* find it difficult to work independently." AR 892 (emphasis
3 added).

4 Plaintiff argues the four reasons the ALJ gave for discounting Dr. Genthe's
5 opinion were all improper. ECF No. 13 at 15-16. She argues that: (1) Dr. Genthe
6 only believed her *psychological* impairments would last "0 months," but that her
7 intellectual impairments would last indefinitely, (2) while her mental status
8 examination findings may have been normal, her IQ test results were not, (3) her
9 subjective self-assessment that her physical impairments were her primary barrier
10 to employment is not reliable, and (4) Dr. Genthe's "vague phrases" were
11 accompanied by a narrative description, a specific rating in each area of
12 functioning, and test results. *Id.*

13 Plaintiff's arguments are well-taken. However, the ALJ did not actually
14 reject any of Dr. Genthe's conclusions, given that his conclusions were adopted
15 and incorporated into the residual functional capacity. *See Turner v. Comm'r of*
16 *Soc. Sec.*, 613 F.3d 1217, 1223 (9th Cir. 2010). Accordingly, there was no conflict
17 for the ALJ to resolve and therefore his analysis about what weight he would have
18 given Dr. Genthe's opinion if it conflicted with the residual functional capacity
19 was superfluous. *See id.* (upholding similar analysis in the alternative).

20 ///

D. The ALJ did not Err by Not Considering Leta Berkshire's Testimony in the New Decision

Finally, Plaintiff argues that the ALJ erred by failing to reference or analyze the testimony of Leta Berkshire—the prior vocational expert who testified at the May 2015 hearing—in his new decision. ECF No. 13 at 17-18. Although Mark Harrington testified at the July 2018 hearing that Plaintiff could maintain competitive employment despite her absenteeism, Plaintiff argues that Ms. Berkshire’s prior testimony from the May 2015 hearing supported an opposite conclusion and should have been considered. *Id.*

Plaintiff cites no legal authority for her argument that ALJs are required to consider vocational testimony from prior hearings. *See* ECF No. 13 at 17-18, No. 16 at 2-3. Instead, the opposite is true—"where an ALJ properly relies on the testimony of one vocational expert, 'he need not address the testimony of another VE.'" *Brando v. Colvin*, 2017 WL 2364194, at *23 (D.N.J. 2017); *see also Villa v. Astrue*, 2012 WL 2847730, at *3 (C.D. Cal. 2012), *aff'd sub nom. Villa v. Colvin*, 540 Fed. Appx. 639 (9th Cir. 2013); *Johnson v. Colvin*, 2015 WL 1954644, at *4 (W.D. Pa. 2015) ("As a general matter, the ALJ properly relied on the vocational expert's testimony from the Second Hearing, and was not required to address the vocational expert's testimony from the First Hearing."); *Ramirez v. Comm'r of Soc. Sec. Admin.*, 463 Fed. Appx. 640, 643 (9th Cir. 2011) ("[D]espite the ALJ's lack of explanation for not relying on the testimony of the unavailable vocational

1 expert from the first hearing, the ALJ properly relied on the vocational expert's
2 testimony at the second hearing."). Accordingly, the ALJ's "failure to address the
3 testimony of the prior vocational expert[] is not a basis for remand or reversal."
4 *Brando*, 2017 WL 2364194, at *23.

5 **VI. Order**

6 Having reviewed the record and the ALJ's findings, the Court finds the
7 ALJ's decision is supported by substantial evidence and is free from legal error.
8 Accordingly, **IT IS ORDERED:**

- 9 1. Plaintiff's Motion for Summary Judgment, **ECF No. 13**, is **DENIED**.
- 10 2. Defendant's Motion for Summary Judgment, **ECF No. 15**, is
11 **GRANTED**.
- 12 3. Judgment shall be entered in favor of Defendant and the file shall be
13 **CLOSED**.

14 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
15 Order, forward copies to counsel, and **close the file**.

16 **DATED** this March 9, 2020.

17 *s/Robert H. Whaley*
18 ROBERT H. WHALEY
19 Senior United States District Judge
20